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No. 10-293

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

ARTEMIO MARCOS ABAD, INDIVIDUALLY AND AS TRUSTEE OF THE ARTEMIO M. ABAD REVOCABLE TRUST; GLORIA PASCUA ABAD, INDIVIDUALLY AND AS TRUSTEE OF THE GLORIA P. ABAD REVOCABLE TRUST,

Petitioners,

v.

FINANCE FACTORS, LIMITED; CENTRAL PACIFIC BANK, SUCCESSOR-IN-INTEREST TO CITY BANK; DIRECTOR OF BUDGET AND FISCAL SERVICES, CITY AND COUNTY OF HONOLULU; AMERICAN GENERAL FINANCE, INC.; ERLINDA GONZALES AND WILSON U. PASCUA, INDIVIDUALLY AND DOING BUSINESS AS HONLAND REALTY,

Respondents.

On Petition For Writ Of Certiorari To The Intermediate Court Of Appeals Of Hawai`i

RESPONDENT FINANCE FACTORS, LIMITED'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the matter raised by Petitioners is moot.

2. Whether the Court has jurisdiction under 28 U.S.C. section 1257(a) to review this matter where the Intermediate Court of Appeals of the State of Hawai`i ("Appeals Court") neither ruled on nor discussed any federal questions in its decision below.

3. Whether the Hawai`i State courts violated Petitioner Artemio Abad's due process rights during foreclosure proceedings where the United States Bankruptcy Court for the District of Hawai`i ("Bankruptcy Court") lifted the Bankruptcy Stay and permitted the sale of Petitioners' mortgaged properties with "in rem" relief.

LIST OF PARTIES

The parties below were:

1. Artemio Marcos Abad, Individually and as Trustee of the Artemio M. Abad Revocable Trust (Plaintiff below and now Petitioner) (hereinafter "Artemio")

2. Gloria Pascua Abad, Individually and as Trustee of the Gloria P. Abad Revocable Trust (Plaintiff below and now Petitioner) (hereinafter "Gloria")

3. Finance Factors, Limited (Defendant below and now Respondent) (hereinafter "FF")

4. Central Pacific Bank, successor-In-Interest to City Bank (Defendant below and now Respondent) (hereinafter "CPB")

5. Director of Budget and Fiscal Services, City and County of Honolulu (Defendant below)

6. American General Finance, Inc. (Defendant below)

7. Erlinda Gonzales and Wilson U. Pascua, Individually and dba Honland Realty (Defendants below)

8. Jennifer Abad (Defendant below)

STATEMENT PURSUANT TO RULE 29.6

FF is a wholly owned subsidiary of Finance Enterprise, Limited, a Hawai`i corporation that owns all of FF's stock.

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COUNTERSTATEMENT OF JURISDICTION

Petitioners attempt to invoke this Court's jurisdiction under 28 U.S.C. section 1257 on the basis of alleged violations of federal constitutional law. FF disagrees. First and foremost, the matter raised by Petitioners is moot. Additionally, as fully discussed below, the decision of the Appeals Court which Petitioners seek review did not involve a federal question. Hence, jurisdiction is not properly invoked.

COUNTERSTATEMENT OF THE CASE

1. Background

Petitioners Artemio and Gloria are married and previously owned 2 parcels of residential real property in Honolulu, Hawai`i. They defaulted on their financial obligations and their creditors, FF and CPB, sought foreclosure of their mortgaged properties. After Petitioners filed multiple defective bankruptcy petitions, the Bankruptcy Court eventually allowed the sale of Petitioners' mortgaged properties pursuant to *in rem* orders. Petitioners did not appeal the Bankruptcy Court's *in rem* orders. Petitioners' mortgaged properties were sold on October 8, 2002, to good faith purchasers. Although they appealed the foreclosure proceedings twice to the Hawai`i Appeals Court, Petitioners did not seek to stay the orders allowing foreclosure of their properties. In the 2009 Summary Disposition Order, the decision that dismissed Petitioners' second appeal and which Petitioners seek

substantive review by this Court, the Appeals Court found Petitioners' challenge of the foreclosure proceedings moot under Hawai`i law. The Supreme Court of Hawai`i denied Petitioners' request to review the Appeals Court's Summary Disposition Order.

2. The Underlying Dispute

On March 28, 2001, CPB filed a complaint against Artemio and Gloria (collectively "Petitioners"), along with the other defendants below, for money judgment and foreclosure of Petitioners' property at 3345 Ala Akulikuli Street in Honolulu, Hawai`i. CPB's complaint was filed in the Circuit Court of the First Circuit, State of Hawai`i (a trial level court referred to hereafter as the "Circuit Court").

On April 23, 2001, FF filed a Crossclaim against the Petitioners and the defendants below alleging default on a promissory note in favor of FF, and sought a money judgment against the Petitioners and foreclosure of their properties at 3345 Ala Akulikuli Street and 98-1457 Hoomahie Loop in Honolulu, Hawai`i (collectively the "Mortgaged Properties").

On May 24, 2001, after Petitioners and defendants below failed to respond to pleadings, FF moved for entry of default judgment and for an interlocutory decree of foreclosure against the Petitioners and defendants below. Petitioners and Jennifer Abad, their daughter and defendant below, then filed numerous defective bankruptcy petitions:

1. On June 20, 2001, Gloria filed a Voluntary Petition for Bankruptcy in Br. No. 01-02461. On July 13, 2001, Br. No. 01-02461 was dismissed for Gloria's failure to satisfy the bankruptcy filing requirements.

2. On August 7, 2001, Artemio filed a Voluntary Petition for Bankruptcy in Br. No. 01-03144. On August 28, 2001, Br. No. 01-03144 was dismissed for Artemio's failure to satisfy the bankruptcy filing requirements.

3. On October 2, 2001, Jennifer filed a Voluntary Petition for Bankruptcy in Br. No. 01-03867. Br. No. 01-03867 was voluntarily dismissed on October 18, 2001.

4. On November 21, 2001, Jennifer filed another Voluntary Petition for Bankruptcy in Br. No. 01-04564, which was dismissed on December 11, 2001, for Jennifer's failure to satisfy the bankruptcy filing requirements.

On March 4, 2002, the Circuit Court entered an order granting FF's motion for default judgment against defendants below and an interlocutory decree of foreclosure ("FF Foreclosure Decree"). On June 20, 2002, the Circuit Court entered a similar order in favor of CPB ("CPB Foreclosure Decree").

On July 1, 2002, the day of the foreclosure sale of the Mortgaged Properties, Gloria again filed a Voluntary Petition for Bankruptcy in Br. No. 02-02358.

To proceed with foreclosure, CPB and FF moved the Bankruptcy Court to lift the stay in Gloria's Bankruptcy case. On August 8, 2002, the Bankruptcy Court entered its first *in rem* order lifting the stay and permitting FF's foreclosure sale of the Mortgaged Properties. *See* Order Granting Movant and Secured Creditor Finance Factors, Limited's Motion for Relief From the Automatic Stay. (Respondent FF's Appendix ("Resp't.App.") 1.) On September 9, 2002, the Bankruptcy Court entered its second *in rem* order lifting the stay in Gloria's bankruptcy action and permitting CPB to proceed with foreclosure of the property mortgaged under the CPB note. (Petitioners' Appendix ("Pet'r.App.") 1.) Hereinafter, the August 8, 2002 and September 9, 2002 *in rem* orders shall be collectively referred to as the "*in rem* orders."

Petitioners did not appeal the decisions of the Bankruptcy Court or otherwise challenge the validity of the *in rem* orders, nor did they seek to stay either the FF Foreclosure Decree or the CPB Foreclosure Decree (collectively the "Foreclosure Decrees"). Rather, on September 4, 2002, Artemio filed another Voluntary Petition for Bankruptcy, which was dismissed on October 29, 2002, on the motion of the Office of the Bankruptcy Trustee. The Mortgaged Properties were sold on October 8, 2002.

3. Petitioners' First Appeal And Post-Appeal "Motion to Set Aside"

Petitioners filed three (3) separate appeals before the Appeals Court in Hawai'i. The appeals were consolidated and on January 12, 2005, the Appeals Court issued a written opinion in *City Bank v. Abad*, 105 P.3d 1212 (Haw. 2005). For the first time on appeal, Petitioners challenged the validity of the Bankruptcy Court's *in rem* orders by alleging the Appeals Court did not have subject matter jurisdiction to permit foreclosure of the Mortgaged Properties. *Id.* at 1217. The Appeals Court unequivocally held that Petitioners failed to satisfy their appellate burden to challenge the Bankruptcy Court's *in rem* orders. *Id.* The Appeals Court refused to invalidate the *in rem* orders and rejected Petitioners' claim that the Circuit Court lacked jurisdiction to enter the Foreclosure Decrees.

On February 21, 2006, more than a year after the Appeals Court issued its decision dismissing the Petitioners' appeals in *City Bank*, the Petitioners returned to Circuit Court and filed a motion to set aside the Foreclosure Decrees by asserting that the Bankruptcy Court's *in rem* orders were void for due process violations ("Motion to Set Aside"). Despite Petitioners' submission of the entire Bankruptcy Court record for Gloria Abad's Bankruptcy Case Br. No. 02-02358, the Circuit Court denied the motion. (Pet'r.App.5.)

4. The Opinion Below

Petitioners filed a second appeal to the Appeals Court and argued the Circuit Court erred in denying the Motion to Set Aside. Claiming a violation of Artemio's due process rights for lack of notice, Petitioners resurrected their challenge to the validity of the Bankruptcy Court's *in rem* orders as applied to Artemio, a non-debtor co-owner of the Mortgaged Properties.[1] Petitioners alleged that Artemio was not a party to Gloria's bankruptcy and had not received notice or an opportunity to be heard before the stays were lifted *in rem* in Gloria's bankruptcy case. On December 28, 2009, the Appeals Court entered its Summary Disposition Order dismissing Petitioner's appeal for mootness. (Pet'r.App.8.) Highlighting Petitioners' failure to obtain a stay of the Foreclosure Orders, coupled with the sale of the Mortgage Properties to good faith purchasers, the Appeals Court dismissed Petitioners' appeal citing Hawai i law. (Pet'r.App.20.) Upon finding the matter moot, the Appeals Court found it "unnecessary to reach [Petitioners'] other arguments on appeal." (Pet'r.App.20.)

[1] The reference to Artemio as a non-debtor is in relation to Gloria's bankruptcy case. Although Artemio was technically a debtor in relation to *his* bankruptcy case, for purposes of this Brief "debtor" refers to Gloria and "co-owner" refers to Artemio.

Petitioners then sought a writ of certiorari before the Supreme Court of Hawai`i, which was ultimately denied on May 21, 2010. (Pet'r.App.21.)

ARGUMENT

The Appeals Court's Summary Disposition Order, and the Supreme Court of the State of Hawai`i's ("Hawai`i Supreme Court") denial of certiorari, is correct. The Appeals Court held Petitioners' case moot on Hawai`i law without deciding any federal issues. The Hawai`i Supreme Court properly denied Petitioners' writ to challenge the Summary Disposition Order. Additionally, Petitioners were afforded their due process during the entirety of the foreclosure proceedings. Further review by this Court is therefore not warranted.

I. PETITIONERS' CASE IS MOOT

"In general a case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt*, 455 U.S. 478, 481 (1982). The failure to stay a foreclosure order will render appellate review moot if the property at issue is sold to a good faith purchaser. *See Oakville Dev. Corp. v. Federal Deposit Ins. Corp.*, 986 F.2d 611, 613 (1st Cir. 1993); *In re Sullivan Cent. Plaza I, Ltd.*, 914 F.2d 731, 733 (5th Cir. 1990); *Duncan v. Farm Credit Bank*, 940 F.2d 1099, 1104 (7th Cir. 1991); *Nat'l Mass Media Telecomm. Sys. v.*

Stanley, 152 F.3d 1178, 1180 (9th Cir. 1998); *In re Kahihikolo*, 807 F.2d 1540, 1542 (11th Cir. 1987).

First, in this case, the issues raised by Petitioners were dismissed by the Appeals Court for mootness. Second, the issues remain moot because the Mortgaged Properties were sold to good faith purchasers on October 8, 2002. Third, during the long course of litigation by Petitioners, they failed to seek a stay of the Foreclosure Orders. Finally, now eight years later, Petitioners have no legal interest in the Mortgaged Properties, nor can judicial process reinstate any interest that Petitioners might have previously enjoyed.

II. THE COURT LACKS JURISDICTION OVER THE PETITIONED MATTER

Petitioners failed to properly invoke the Court's jurisdiction under 28 U.S.C. § 1257(a). The challenged Summary Disposition Order of the Appeals Court never raised any question of federal law. As noted, *supra*, the Appeals Court dismissed Petitioners' appeal for mootness under Hawai`i law and found it "unnecessary to reach [Petitioners'] other arguments on appeal." (Pet'r.App.20.) It "is essential to the jurisdiction of the Supreme Court under [28 U.S.C. section] 1257(a) that a substantial federal question has been properly raised in the state court proceedings." Eugene Gressman et al., *Supreme Court Practice* § 3.16, at 180-81 (9th ed. 2007). This Court has made clear that where, as here, "the highest state

court is silent on a federal question before us, we assume that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had a fair opportunity to address the federal question." *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997) (internal citations omitted). As this Court further noted, "'it would be unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Id.* at 90 (internal citation omitted).

In this case, Petitioners' appeal before the Appeals Court was not decided on a federal question, but upon the application of Hawai`i law on mootness. The result leaves this Court without jurisdiction under 28 U.S.C. § 1257(a) to review the judgment of the Appeals Court. The petition for writ of certiorari, accordingly, should be denied.

III. THE HAWAI`I STATE COURTS DID NOT VIOLATE PETITIONERS' DUE PROCESS RIGHTS

The whole premise of the Petitioners' due process violation argument is that Artemio did not have actual knowledge of, or participate in, what happened between the initial filing of Gloria's bankruptcy case and the entry of the *in rem* orders. The Circuit Court entered the Foreclosure Decrees after Petitioners failed to respond and defend themselves in

the foreclosure proceedings. The Bankruptcy Court, in permitting the sale of the Mortgage Properties by lifting the Bankruptcy Stay, considered Petitioners' due process rights and held:

> the relief is being granted "in rem" because the Debtor (Gloria) and other persons who claim an interest in the Property (including Artemio) have not acted in good faith to reorganize or seek discharge of their debts under the Bankruptcy Code, but rather have used the filing of a bankruptcy case as an obstruction to a lender's efforts to foreclosure on mortgaged property. As used herein, "in rem" relief means that the relief from stay is granted not only personally against the Debtor but with respect to the subject property; and shall be deemed binding and of full force and effect in any subsequent bankruptcy case, whether commenced by a debtor in this case or any other individual or entity claiming an interest in the subject property.

Pet'r.App.2. Petitioners never raised a due process violation argument until their Motion to Set Aside on February 21, 2006, well after the sale of the Mortgaged Properties and after their first appeal in *City Bank*. Neither Artemio nor the other defendants below had their due process rights violated during the foreclosure proceedings.

The factual record below demonstrates that Artemio had actual knowledge of the *in rem* orders. However, even if he did not, actual notice is not strictly required when a debtor has been abusing the

bankruptcy system. All that is required is "notice as is appropriate in the particular circumstances." *In re Fernandez*, 212 B.R. 361, 370 (Bankr. C.D. Cal. 1997), *aff'd*, 227 B.R. 174 (B.A.P. 9th Cir. 1998) ("*Fernandez I*") (quoting 11 U.S.C. § 102(1)(A) (2006)). Under the appropriate circumstances, constructive notice to the co-owner, *e.g.*, Artemio, of property at issue is sufficient to satisfy due process concerns, and adversary proceedings against the co-owner need not be brought. *See In re Roeben*, 294 B.R. 840, 848 (Bankr. E.D. Ark. 2003) (finding that debtor and spouse acted in concert to abuse the automatic stay provisions of the Bankruptcy Code and charging spouse with constructive knowledge of debtor's bankruptcy proceedings); *In re Feldman*, 309 B.R. 422, 429 (Bankr. E.D.N.Y. 2004) (holding that if the Court had *in rem* jurisdiction over the subject property, an adversary proceeding need not be commenced in order to enter prospective relief from stay as to a non-debtor).

In *Fernandez I*, the debtor filed his first bankruptcy petition on the eve of the bank's foreclosure on his home. In subsequent months, his case was dismissed and his wife filed 2 bankruptcy petitions, which were also dismissed. *In re Fernandez*, 227 B.R. 174, 176 (B.A.P. 9th Cir. 1998) ("*Fernandez II*"). Two days before the bank's rescheduled foreclosure sale, the debtor conveyed as a gift half of his interest in his home to Belinda Amador, who filed for bankruptcy the next day. *Id.* The debtor then filed another bankruptcy petition. *Id.* Without notice to the debtor, the

bank obtained an *in rem* order lifting the automatic stay in Ms. Amador's bankruptcy case and sold the property. *Fernandez I*, 212 B.R. at 364. The debtor brought a motion to vacate the dismissal after the court dismissed the debtor's second bankruptcy case. The debtor claimed that if he was not granted the relief he sought, he would lose his home without notice and the opportunity for a hearing, and that the *in rem* order and foreclosure in the Amador case deprived him of his constitutionally-guaranteed due process of law. *Fernandez I*, 212 B.R. at 365. The court examined the record and applicable law and noted that the Bankruptcy Code only requires notice "as is appropriate in the particular circumstances." *Id.* at 370 (quoting 11 U.S.C.A. § 102(1)(A)). The court, emphasizing the history and timing of the debtor, his wife, and Ms. Amador's bankruptcy filings, charged the debtor with *constructive* notice of Ms. Amador's filings. Mindful of due process considerations, the court explained that "there may come a point when common sense and equitable principles should step in to limit a debtor's right to the protections afforded by the automatic stay." *Id.*

In the instant case, Artemio received the necessary notice of the *in rem* orders. Petitioners' arguments are substantially identical to those unsuccessfully raised by debtors in *Fernandez I*. As the debtor in *Fernandez I* received appropriate notice to satisfy his right to due process, so did Artemio and the other defendants below. Therefore, none of the Petitioners, including Artemio, had their rights to due

process violated during the foreclosure proceedings of the Mortgaged Properties.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF HAWAII

In re GLORIA P. ABAD Debtor.	Case No. 02-02358 (Chapter 7) ORDER GRANTING MOVANT AND SECURED CREDITOR FINANCE FACTORS, LIMITED'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY; EXHIBIT "A" **DATE: August 7, 2002** **TIME: 1:30 p.m.** **JUDGE: Hon. Robert J. Faris**

12881/51659
(19093v1)

ORDER GRANTING MOVANT AND SECURED CREDITOR FINANCE FACTORS, LIMITED'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY

(Filed Aug. 2, 2008)

Movant and Secured Creditor Finance Factors, Limited ("Factors") filed its Motion for Relief from the

Automatic Stay (the "Motion") herein on July 11, 2002. July 23, 2002, was the expiration date for the time within which anyone could file an opposition to Factors' Motion. There was no opposition filed to said Motion.

The Court has carefully considered the Motion, the Notice of Hearing, the Memorandum in Support of the Motion, the Declaration of Michael Sakai in Support of the Motion, the Declaration of Donald K. O. Wong, and all other relevant documents contained in the file herein, and based upon such consideration, and upon the Court's finding that no response to the Motion was timely filed as required under Local Bankruptcy Rule 4001-1(a)(3)(A), it is hereby ORDERED THAT:

Pursuant to Local Bankruptcy Rule 4001-1(a)(3)(B) the aforesaid Motion is granted, and the automatic stay of 11 U.S.C. 362(a) as imposed against Factors with respect to the Debtor, Debtor's Estate, and that certain real property located at 98-1457 Hoomahie Loop, Pearl City, Hawaii, and that certain real property located at 3345 Ala Akulikuli Street, Honolulu, Hawaii (collectively the "Property"), of which a copy of the description of the Property is attached hereto as Exhibit "A", and made a part hereof, is hereby terminated; and

Further, that Factors, its attorney, its agents, any foreclosure commissioner or successor commissioner can proceed to exercise any and all of their rights and remedies with respect to the Property, including but not

limited to, foreclosure of Factors' Mortgage against the Property and recovery of possession of said Property.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the relief is being granted "in rem" because the Debtor and other persons who claim an interest in the Property have not acted in good faith to reorganize or seek discharge of their debts under the Bankruptcy Code but, rather have used the filing of a bankruptcy case as an obstruction to a lender's efforts to foreclose on mortgaged property. As used herein, "in rem" relief means that the relief from stay is granted not only personally against the Debtor but with respect to the subject property; and shall be deemed binding and of full force and effect in any subsequent bankruptcy case, whether commenced by a debtor in this case or any another individual or entity claiming an interest in the subject property. This in rem relief shall be effective only until the earlier of (i) 240 days after the date of entry of this order, or (ii) the recovery of possession by a purchaser at a judicial or non-judicial sale upon foreclosure of the subject mortgage.

It is hereby ordered that Factors may not obtain a deficiency judgment without further order of this court.

DATED: Honolulu, Hawaii, AUG 08 2002.

/s/ Robert J. Faris
UNITED STATES
BANKRUPTCY JUDGE